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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MARK WILLIAM DUGAN, Defendant and Appellant.	G037490 (Super. Ct. No. 03CF3713) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Thomas James Borris, Judge. Affirmed and remanded with directions.

Carl Fabian, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Gil Gonzalez and Kelley Johnson, Deputy Attorneys General, for Plaintiff and Respondent.

Mark William Dugan appeals from his conviction on multiple counts of robbery (Pen. Code, § 211),[1] street terrorism (§ 186.22, subd. (a)), making criminal threats (§ 422), dissuading a witness by force or threat (§ 136.1, subd. (c)(1)), and possession of a firearm by a felon (§ 12021, subd. (a)(1)), and numerous related enhancements including crimes committed while on bail, use of a firearm, and crimes committed for the benefit of a criminal street gang (§§ 12022.1, subd. (b), 12022.53, subd. (b), 12022.5, subd. (a), 186.22, subd. (b)(1)). Dugan raises numerous claims of error, none of which have merit. We affirm his conviction but remand for correction of clerical errors in the sentencing minute order and the abstract of judgment.

I

FACTS

January 12, 2003, PetSmart Robbery

Brian Mensing was the manager at the PetSmart store in San Juan Capistrano, Elizabeth Avila was a cashier, and Harold Comstock was another store employee. All were on duty the night of January 12, 2003. Dugan had worked at the store briefly in April 2002.

After closing the store at about 7 p.m., Mensing escorted Avila to the cash room to count her drawer, and then he walked around the store. When he returned to the cash room 15 minutes later, a man was standing in the doorway of the manager's office, wearing dark clothing with his face covered, holding a gun. The man pointed the gun at Mensing and motioned him and Comstock into the cash office with Avila. The man told Mensing to put the money from the safe into a grocery bag. Mensing complied, loading the bag with bills and coins. The man spoke briefly into a walkie-talkie, directed Mensing to pull the telephone out of the wall, told the three store employees to wait for five minutes, and left the store with the bag of money.

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[1] All further statutory references are to the Penal Code, unless otherwise indicated.

A security guard patrolling outside a nearby store saw Dugan at about 7 p.m., in the PetSmart parking lot wearing a dark blue suit carrying something heavy in white bags. Dugan got into a car that was waiting in the alley, and the car drove away.

A walkie-talkie and bills in varying denominations were found in the PetSmart parking lot. A ski cap was found in one of the offices inside the store. The ski cap had DNA on it that matched Dugan's exactly. The walkie–talkie had DNA from three sources, including one matching Dugan.

January 13, 2003, Motel 6 Westminster

At around 8 p.m., on January 12 (about an hour after the PetSmart robbery), Santa Caffey received a telephone call from Anton Acevedo, who was an acquaintance of her ex-boyfriend, Arthur Hobbs. Acevedo, who had ties to the "Nazi Low Riders" White supremacist gang, and Hobbs had been cellmates in jail from December 7, 2002, to January 5, 2003. Caffey did not believe Hobbs was in a White supremacist gang (and she did not know about the existence of a gang called "PENI" until this case), but Hobbs did have tattoos saying "White Pride" and "Peckerwood." Acevedo had tattoos on the side of his head saying "F-U-C-K" and "C-D-C."

Acevedo asked Caffey to meet him at a Motel 6 in Westminster. When she arrived, Acevedo was sitting in a car with Dugan, who Acevedo identified as "Soldier." Acevedo gave Caffey money, and she went inside the motel office with Dugan and rented a room for him. She departed, leaving Acevedo and Dugan in the motel room.

In the early morning hours of January 13, Jennifer Davis, a dancer, was sent by her employer to perform in Dugan's room at the Motel 6. Her bodyguard went with her.

A man wearing blue jeans and a jacket with no shirt underneath answered the door and let her in. He was the only person in the room. (At trial, Davis was unable to identify the man.) She described the man as having several gang-related tattoos—of the type she had seen on members of skinhead gangs she was familiar with from the

neighborhood where she had grown up. Davis was familiar with "NLR" and "PENI" as being names of skinhead gangs, and had often seen skinhead tattoos such as swastikas, iron crosses, and similar items. The man in the room appeared to Davis to be under the influence of methamphetamine— "tweaking" and on "quite a run."

After discussing the price for her dance services, the man gave her $90 in bills and wrapped coins—which was not enough money. When Davis tried to telephone her employer to ask if she should stay or leave, the man became very agitated. The man told Davis he was a drug dealer, was wanted, had just committed a robbery, and had paid her with the proceeds. He then told her not to call the police or he would kill her. The man said if he was unable to kill her, he "knew people" he could have kill her, which Davis understood to be a reference to other skinheads. As Davis tried to leave, the man pulled a gun from behind a dresser and pointed it at her head and up in the air. When Davis's bodyguard knocked on the door, the man again repeated his threat to Davis he would kill her if she called the police. The man said he "was already on the run" and "didn't care anymore."

After Davis assured the man she would not call the police, he demanded his money back. She put her purse on the bed, and the man took the money. Davis was able to run from the room. Davis did not call the police but called her employer, who in turn called the police.

Davis's bodyguard testified that after leaving Davis in the motel room, he waited for her outside, but became worried when she did not immediately come out of the room and give him the customer's money (which was the usual protocol). The bodyguard knocked on the door of the room and heard noises like furniture being flipped over. Davis yelled and then ran out of the room. The bodyguard saw a man inside holding a gun near his head pointed towards the ceiling. He did not get a clear look at the man's face, but the man had a shaved head.

Westminster Police Officer Kyle Seasock responded to the dispatch call concerning an incident at the Motel 6. He went to the motel office and asked about the room in question, which was registered to Caffey. He went to the room, and Dugan answered the door wearing a dark sports coat and no shirt underneath. The room was disheveled inside—the television was pulled away from the wall. Seasock found a .44 Magnum bullet and cash and coins—some rolled—on the bed. He found a .44 Magnum revolver, with bullets inside, covered with a towel in a trash can outside the room, about seven feet away from the door.

Expert Gang Testimony

Craig Brown, an officer with the Orange Police Department, testified as an expert on gangs. He taught numerous courses on White supremacist gangs to law enforcement agencies. Brown explained tattoos are important in White supremacist gangs as tattoos are status symbols, representing the gang's belief system. Gang tattoos are a means of intimidation during crimes because they show victims "what they've done, where they've been, who they're with, and who they're affiliated with." "White Pride" and "Peckerwood" are common tattoos worn by members of White supremacist gangs. Brown also testified that monikers are very important in gang culture. Monikers are nicknames given to gang members, and are usually based on actions the individual undertakes on behalf of the gang or something about the individual's appearance.

Brown testified weapons are also a very important part of White supremacist gang culture as they are a means for gaining respect through committing crimes, and hurting or intimidating victims. Brown explained respect is an important theme in gang culture. A gang member earns respect through commission of crimes, possession of weapons, fighting, working for the gang, and putting money on people's prison books— "respect and money equal power; power is respect."

Brown was familiar with a gang called PENI—the name came from Public Enemy Number 1 or PENI Death Squad. The PENI gang engaged in committing

robberies and violent acts against other gangs. As PENI members began to enter the correctional system, they were considered a "disruptive group" in the prison system, not a prison gang subject to the same restrictions on movement around the prison yards. Thus, PENI members became "workers" for both the Nazi Low Riders gang and the Aryan Brotherhood gang, able to conduct business for both of those White supremacist gangs inside and outside of prison. As of January 2003, PENI was an ongoing organization with about 200 male members.

Brown testified other common names, signs, and symbols associated with PENI were Public Enemy Number 1, P-E-N-I, P-E-N-1, P.D.S., Hate Incorporated, Death Church, and PENI Death Squad. PENI also used the numbers 7-3-7, which correspond to P.D.S. PENI gang members displayed White supremacist tattoos, or skinhead tattoos, with symbols of Celtic crosses, and lightning bolts, the words "White Power," and "German" tattoos of swastikas and war birds.

According to Brown, as of January 2003, the primary activities of PENI were committing crimes defined in section 186.22, subdivision (e), including assault with a deadly weapon, murder, attempted murder, robbery, possession of drugs for sale, and extortion. He testified about predicate crimes involving known PENI members in 2002, 2000, and 1999 including: (1) a guilty plea to possession of methamphetamine for sale committed for the benefit of the PENI street gang; (2) a guilty plea to assault with a deadly weapon committed for benefit of PENI; and (3) a guilty plea to attempted murder committed for benefit of PENI. In Brown's opinion, PENI was an active criminal street gang on January 12, 2003.

Brown testified about Dugan's involvement with PENI based on interviews with members of PENI and Nazi Low Riders, and reviewing documents pertaining to this case and other criminal cases involving Dugan. He described some of Dugan's many tattoos which included: "I.E." for Inland Empire—the Riverside area Dugan came from; "P.D.S." (which stood for PENI Death Squad) with swastikas between the letters; an iron

eagle or war bird (which symbolized Dugan's involvement in a racial fight in jail); a medallion with a swastika; and the word PENI around a Celtic circle with a swastika and U.S. flag in the center (indicating it was a U.S. skinhead group). Brown explained the tattoos worn by Dugan could not be worn by someone who was not part of the PENI gang: "If they're put on and they're not part of the group, they'll be cut off or they'll be held to answer for having those tattoos." Dugan also had tattoos of a Grim Reaper (which is a common symbol worn in tribute to dedicating one's life to death and crime) and other tattoos saying PENI.

Brown explained a street terrorist enforcement program ("STEP") card or notice is a document given to an individual by which law enforcement advises the individual he or she is associated with a criminal street gang, making them subject to various enhancements if they are involved in particular crimes. Dugan was given a STEP notification in 1998. At that time, Dugan told officers he was a member of PENI Death Squad, went by the moniker "Soldier," and lived with another known member of PENI.

Dugan was given a second STEP notification in December 2002, when he was arrested for possession of drugs and weapons. In a search of Dugan's residence at the time, police found several photographs of Dugan posing with known PENI members, including a man known to be a "ranking member" of PENI. In the photographs, Dugan is displaying his gang tattoos and wearing a red belt—symbolic of one's "willingness to shed blood for the White race." There was also a photograph of a car Dugan drove in December of 2002, on which there were stickers indicating his adherence to a White supremacist belief system. Police also found letters addressed to Dugan from known PENI members, addressing Dugan as "Soldier," and discussing gang-related matters. Based upon the foregoing, Brown opined Dugan was an active participant in PENI when the offenses occurred.

The prosecutor asked Brown a hypothetical mirroring the facts of the PetSmart robbery. Brown opined that if an active participant of PENI, who wears PENI

and other gang-related tattoos, goes into a business and robs its employees at gunpoint, and if while committing the robbery, the PENI gang member communicates with a crime partner on a walkie-talkie and then immediately thereafter has a person with ties to a White supremacist gang rent a motel room for him, then the robbery was committed for the benefit of PENI. Brown explained committing the robbery at gunpoint would not only enhance the reputation of the PENI gang member, but would benefit the gang monetarily because the gang member could use the fruits of the crime to aid other gang members.

The prosecutor continued with a hypothetical mirroring the facts of the Motel 6 incident. Brown opined that if the same active PENI member, after committing the robbery, invites a dancer to his motel room, is freely displaying his gang tattoos when she arrives, tells the dancer he is on the run, is a drug dealer, and is paying her with money he just obtained in a robbery, and the gang member then brandishes a gun and threatens the dancer to not tell the police and tells her he will kill her or have someone else kill her if she does, then the crime of threatening the witness was committed for the benefit of PENI. Brown explained using a weapon, displaying gang tattoos, threatening about what the gang member or others can do is all part of the fear subculture of the gang and is part of gaining respect for the gang member and the gang as a whole.

Charges/Verdicts

With regards to the January 12, 2003, PetSmart incident, Dugan was charged with three counts of robbery (§ 211, 212.5, subd. (c)) (counts 1 (Mensing), 2 (Comstock), & 3 (Avila)), and one count of street terrorism (§ 186.22, subd. (a)) (count 4). With regards to the January 13, 2003, Motel 6 incident, he was charged with dissuading a witness (§ 136.1, subd. (c)(1)) (count 5), making a criminal threat (§ 422) (count 6), and a second count of street terrorism (§ 186.22, subd. (a)) (count 8). Dugan was also charged with being a felon in possession of a firearm (§ 12021, subd. (a)(1)) (count 7). Enhancement allegations included personal use of a firearm (counts 1, 2, 3, 5

& 6); committing offenses for the benefit of a street gang (counts 1, 2, 3, 5, 6 & 7); and committing offense while released on bail (counts 1 through 8). A jury found Dugan guilty on all counts and found all enhancement allegations to be true. He was sentenced to a total term of 40 years plus an indeterminate term of seven years to life on count 5—the details of the sentence will be discussed anon.

II

COUNT 2: ROBBERY (COMSTOCK)

Dugan contends his conviction on count 2, the PetSmart robbery of Comstock, must be reversed because there is insufficient evidence Comstock had constructive possession of his employer's property. We reject his contention.

It is undisputed Comstock was a PetSmart employee who was immediately present when the money was taken through the use of force or fear (§ 211). But Dugan argues that because there is no evidence as to Comstock's actual job duties, there is no basis for determining whether he had sufficient authority over his employer's property so as to be found to have constructively possessed it.

Dugan's argument is based on the now discredited case *People v. Frazer* (2003) 106 Cal.App.4th 1105 (*Frazer*), in which the court held that although a store employee without actual possession of his employer's property may be a robbery victim on a theory of constructive possession due to his or her special relationship with the employer, not all store employees are necessarily victims. *Frazer* concluded there must be "a fact-based inquiry" to determine if the particular employee "has sufficient representative capacity with respect to the owner of the property, so as to have express or implied authority over the property. Under this standard, employee status does not alone as a matter of law establish constructive possession. Rather, the record must show indicia of express or implied authority under the particular circumstances of the case." (*Id.* at pp. 1114-1115.)

Frazer, supra, 106 Cal.App.4th 1105, has recently been disapproved by our Supreme Court in *People v. Scott* (2009) 45 Cal.4th 743, 755, which held that regardless of an employee's job duties, "all on-duty employees have constructive possession of the employer's property during a robbery," and, provided all other elements of the offense are proven, are robbery victims. In supplemental briefing, Dugan concedes *Scott* controls our analysis (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455). Accordingly, we must reject his challenge to his conviction for robbery of Comstock.

III

STREET TERRORISM SUBSTANTIVE COUNTS AND ENHANCEMENTS

Dugan contends there is insufficient evidence to support his convictions for street terrorism (counts 4 & 8) or the jury's true findings on the street terrorism enhancements alleged as to counts 1, 2, and 3 (the PetSmart robberies), and counts 5, 6, and 7 (the Motel 6 incident). We reject his claims.

A. Sufficiency of Evidence

"'"To determine the sufficiency of the evidence to support a conviction, an appellate court reviews the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt."' [Citations.] '"'If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment.'"' [Citations.] The standard of review is the same when the prosecution relies mainly on circumstantial evidence. [Citation.]" (*People v. Valdez* (2004) 32 Cal.4th 73, 104 (*Valdez*).)

Section 186.22, subdivision (a), defines the substantive street terrorism offense and states: "Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang

activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished . . . in the state prison for 16 months, or two or three years."

Section 186.22, subdivision (b)(1), enhances the punishment for gang-related crimes for "any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members . . . ."

In cases where gang offenses and enhancements are alleged, expert testimony regarding the culture, habits, and psychology of gangs is generally permissible because these subjects are "'"sufficiently beyond common experience that the opinion of an expert would assist the trier of fact. [Citations.]" [Citation.]' [Citation.]" (*People v. Killebrew* (2002) 103 Cal.App.4th 644, 656.) For example, an expert may properly testify concerning the "motivation for a particular crime" and "whether and how a crime was committed to benefit or promote a gang[.]" (*Id.* at pp. 656-657.)

Here, Dugan does not dispute that PENI is a criminal street gang within the meaning of section 186.22, nor does he dispute he was an active participant in PENI at the time of these offenses. Rather, Dugan's argument is there is insufficient evidence that either the PetSmart robberies or the Motel 6 offenses involving Davis were committed for the benefit of, or to promote, PENI, or committed with the specific intent to benefit or promote PENI.

Gang Enhancements

We begin with the PetSmart robberies. Substantial evidence supports the conclusion those offenses were committed for the benefit of PENI.

Brown testified a primary activity of PENI was robbery, and robberies assisted the gang by providing funds to its members. He also testified about the importance of weapons and violent acts in White supremacist gang culture—both help

instill fear in the community thus enhancing respect for the gang and enhance the reputation of the gang member within the gang.

When given a hypothetical mirroring the facts of this case, Brown opined that if an active member of the White supremacist gang PENI robbed a business at gunpoint, was obviously working with a partner with whom he communicated during the course of the robbery, and shortly after commission of the robbery was in the company of a known associate of a White supremacist gang and that person secured a motel room for his use, the robbery was committed for the benefit of the gang.

Dugan's reliance on *In re Frank S.* (2006) 141 Cal.App.4th 1192 (*Frank S.*), is misplaced. In that case, minor told police he carried the knife found concealed on his bicycle for protection from rival gangs. (*Id.* at p. 1195.) The petition charged him with felony possession of a dirk or dagger with a gang enhancement. (*Ibid.*) At the jurisdiction hearing, the court found the enhancement allegation true based solely on gang expert testimony minor possessed the knife to protect himself and a gang member would carry a knife for protection from rival gangs and to assault rival gang members. (*Ibid.*) The appellate court reversed the gang enhancement on the ground substantial evidence did not support the specific intent element. The court explained: "In the present case, the expert simply informed the judge of her belief of the minor's intent with possession of the knife, an issue reserved to the trier of fact. She stated the knife benefits the [gang] since 'it helps provide them protection should they be assaulted by rival gang members.' However, unlike in other cases, the prosecution presented no evidence other than the expert's opinion regarding gangs in general and the expert's improper opinion on the ultimate issue to establish that possession of the weapon was 'committed for the benefit of, at the direction of, or in association with any criminal street gang. . . . ' (§ 186.22, subd. (b)(1).) The prosecution did not present any evidence the minor was in gang territory, had gang members with him, or had any reason to expect to use the knife in a gang-related offense. In fact, the only other evidence was the minor's statement to

the arresting officer that he had been jumped two days prior and needed the knife for protection. To allow the expert to state the minor's specific intent for the knife without any other substantial evidence opens the door for prosecutors to enhance many felonies as gang-related and extends the purpose of the statute beyond what the Legislature intended." (*Frank S., supra,* 141 Cal.App.4th at p. 1199.)

Here, in contrast, in addition to the expert testimony, there was evidence Dugan committed the robberies with assistance from another person. Soon thereafter Dugan and Acevedo, a known member of another White supremacist gang for whom PENI worked, Nazi Low Riders, appeared at the Motel 6. The jury could reasonably infer Acevedo was the person helping Dugan commit the robbery. Acevedo contacted Caffey, whose former boyfriend had been his jail cellmate, and asked her to rent a room for them. Although Caffey did not believe her former boyfriend was a gang member, he wore the tattoos associated with White supremacist gangs. Dugan was introduced to Caffey by his gang moniker, "Soldier." Later that evening at the motel, Dugan openly displayed what to Davis were obviously White supremacist gang tattoos, boasted to Davis of having just committed a robbery, told her the money he was paying her with came from the robbery, and threatened Davis he would kill her or have people he knew kill her if she went to the police. The expert testimony coupled with circumstantial evidence of intent was sufficient for a jury to reasonably infer the requisite intent as to the three robbery counts. (*People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1550-1551; *People v. Ferraez* (2003) 112 Cal.App.4th 925, 931.)

We turn then to the Motel 6 incidents. Dugan was convicted of dissuading a witness, making a criminal threat, and being a felon in possession of a handgun. Again, Dugan contends there is insufficient evidence he committed any of these offenses with the specific intent to benefit PENI. Again, we disagree.

Brown testified about the importance of wearing tattoos in White supremacist gang culture—they are status symbols associated with particular acts

committed by the gang member and are a means of intimidation of victims and witnesses. Brown testified about the importance of obtaining and enforcing respect in White supremacist gang culture and about the importance of weapons as a means for gaining respect through committing crimes, and hurting or intimidating victims.

When given a hypothetical mirroring the facts of the Motel 6 incident, Brown opined that if the same active PENI member who had just committed the PetSmart robberies invited a dancer to his motel room, where he freely displayed his gang tattoos, told the woman he was on the run, is a drug dealer, and is paying her with money he just obtained in a robbery, and the gang member then brandishes a gun and threatens the dancer to not tell the police and tells her he will kill her or have someone else kill her if she does, then the crimes were committed for the benefit of the gang. He explained using a weapon, displaying gang tattoos, threatening about what the gang member or others can do is all part of the fear subculture of the gang and is part of gaining respect for the gang member and the gang as a whole.

Substantial evidence supported the gang benefit enhancements as to the Motel 6 counts. This is not, as Dugan contends, identical to the situation presented in *Frank S., supra,* 141 Cal.App.4th 1192. Here, in addition to Brown's expert testimony, there was evidence Dugan had just recently committed robberies to benefit his gang and deliberately invoked his gang affiliation in intimidating Davis.

Dugan complains the prosecutor's hypothetical to Brown was based on an improper factual premise, i.e., the hypothetical "active member of PENI also tells the dancer that he is a member of a White supremacist gang." Dugan complains there is no evidence he actually told her he was a gang member. But there is evidence Dugan openly displayed his gang tattoos, which Davis immediately recognized to be of skinheads or White supremacist gang. Then, when angered by her, Dugan referred to his ability to have people he knew kill Davis should she go to the police. It was not an illogical leap to take that Dugan was deliberately invoking his White supremacist gang affiliation.

Substantive Street Terrorism Counts

In addition to the gang enhancements, Dugan was convicted on two substantive counts of street terrorism—one related to the PetSmart robberies (count 4) and one related to the Motel 6 incident (count 8). Dugan does not distinguish between the enhancements and the substantive street terrorism counts. Rather, he simply assumes that if the enhancements are not supported by substantial evidence, then the substantive street terrorism counts fail too. The simple answer is we have found substantial evidence to support the enhancements.

Section 186.22, subdivision (a), "punishes active gang participation where the defendant promotes or assists felonious conduct by the gang. It is a substantive offense whose gravamen is the participation in the gang itself." (*People v. Herrera* (1999) 70 Cal.App.4th 1456, 1467, fns. and italics omitted.) Thus, it "applies to the perpetrator of felonious gang-related criminal conduct. . . . " (*People v. Ngoun* (2001) 88 Cal.App.4th 432, 436.)

There are three elements to the substantive street terrorism offense: (1) active participation in a criminal street gang; (2) knowledge the gang's members have engaged in a pattern of criminal gang activity; and (3) willfully promoting, furthering, or assisting in any felonious criminal conduct by members of the gang.'" (*People v. Lamas* (2007) 42 Cal.4th 516, 523.) In *People v. Ramirez* (2009) 172 Cal.App.4th 1018, 1030, 1036, this court explained that as to the third element, the felonious criminal conduct must be "gang related rather than a merely personal endeavor."

As already noted, Dugan does not address the street terrorism counts separate from his attack on the enhancements, as to which he challenges only the sufficiency of the evidence supporting the findings his crimes were committed with the intent to benefit or promote the gang. Dugan does not dispute PENI is a criminal street gang and he was an active participant in PENI when he committed the various felony offenses. Nor does he dispute he had knowledge members of PENI engaged in a pattern

of criminal activity. Although there is no requirement the perpetrator intend to benefit the gang by his felonious conduct, the conduct must nonetheless be gang related.

Substantial evidence supports the conclusion both the PetSmart robberies and the crimes arising from the Motel 6 incident were gang related. Brown testified robbery was a primary activity of PENI and explained how committing robberies benefitted the gang. As already discussed, there was evidence from which the jury could reasonably infer the partner with whom Dugan worked during the armed robbery was a member of an affiliated White supremacist gang. After the robberies, Dugan boasted to Davis about the crimes while displaying his gang tattoos, threatening her with a gun, and invoking his ability to call upon people he "knew" to commit violent acts against her on his behalf should she tell anyone about the robberies. The evidence supports a conclusion the robberies and Dugan's subsequent threats to Davis were gang related.

IV

COUNT 5: DISSUADING A WITNESS

A. Sufficiency of Evidence

Dugan contends there is insufficient evidence supporting his conviction for dissuading a witness, Davis (count 5), by force or threat in violation of section 136.1. We reject his contention.

Section 136.1, subdivision (b), makes it unlawful to "attempt[] to prevent or dissuade another person who has been the victim of a crime or who is witness to a crime from doing any of the following . . . : [¶] (1) Making any report of that victimization to any peace officer or state or local law enforcement officer or probation or parole or correctional officer or prosecuting agency or to any judge. [¶] (2) Causing a complaint, indictment, information, probation or parole violation to be sought and prosecuted, and assisting in the prosecution thereof. [¶] (3) Arresting or causing or seeking the arrest of any person in connection with that victimization." If a defendant commits the above acts through "force or by an express or implied threat of force or violence, upon a witness or

victim or any third person or the property of any victim, witness, or any third person[,]" the offense is a felony. (§ 136.1, subd. (c)(1).)

As Dugan points out, the statute envisions two classes of victims: (1) a person who is a witness to a crime; and (2) a person who has been a victim of a crime. The prosecutor argued Davis fit both classes of victim. When Dugan lacked sufficient money to pay Davis for her services, she tried to telephone her employer, and Dugan became very agitated and began threatening her. He told Davis he was a drug dealer, was wanted, had just committed a robbery, and was paying her with money from the robbery. He told her to not call the police, or he would kill her or people he knew would kill her. When Davis tried to leave, Dugan pulled out a gun and pointed a gun at her head repeating his threat to kill her if she called the police. Based on those facts, the prosecutor argued that once Dugan told Davis he had committed a robbery and was paying her with money from the robbery, Davis became a witness as to the robbery offense.[2] Then when Dugan threaten to kill Davis if she told the police, she also became a victim (of the crime of dissuading a witness (count 5) and the crime of making a criminal threat (count 6)), so when Dugan continued to threaten her, she was being dissuaded from reporting not only the robbery but her own victimization.

Dugan argues there is no evidence to support the dissuading a witness conviction on either theory. He argues Davis was not a witness to a crime (i.e., the robbery) because the only information she obtained was Dugan's general statement he had just committed a robbery. Davis did not see the robbery and Dugan gave her no specific information such as who had been robbed or where the robbery took place. Not surprisingly, Dugan cites no cases supporting his position. Once Dugan told Davis he had committed a robbery and the money he gave her for her services came from the

[2] The jury was instructed a "witness" was a person whom the defendant reasonably believed knew "about the existence or nonexistence of facts relating to a crime." (Jud. Council of Cal. Crim. Jury Instns. (2008) CALCIM No. 2622.)

robbery, she became a witness as to the robbery because she now knew facts relating to the commission of a crime.

Dugan also argues Davis was not herself the victim of a crime prior to his threats against her, and he asserts his threats are not sufficient to support the dissuasion count on the theory Davis was a victim of a crime. We disagree. A jury could reasonably conclude that once Dugan threatened to kill Davis she was a victim of a crime. Thus, when he continued to threaten her with death if she went to the police, she was a victim as well as a witness.

B. Jury Instructions

Dugan argues the jury instructions on dissuading a witness were inadequate because they did not require the jury to agree on the crime he was attempting to prevent Davis from reporting. While he concedes the trial court gave a unanimity instruction, CALCRIM No. 3500, Dugan complains the unanimity instruction was defective because it advised the jury it had to agree upon the "act" he committed (i.e., the act that constituted dissuasion) rather than the "crime" he hoped to prevent Davis from reporting (i.e., was he dissuading Davis from reporting the robbery, or dissuading her from reporting his criminal threats against her).

We reject Dugan's contentions. Preliminarily, there is no requirement there be unanimity among jurors as to what *act* constituted dissuasion. Dugan made repeated threats to Davis in a very short time frame—the acts were sufficiently closely connected in time and place as to form part of one transaction and thus fall under the continuous course of conduct exception to the unanimity election rule. (*People v. Crandell* (1988) 46 Cal.3d 833, 875, disapproved on other grounds by *People v. Crayton* (2002) 28 Cal.4th 346, 361; *People v. Salvato* (1991) 234 Cal.App.3d 872, 882.) Furthermore, Dugan cites absolutely no authority to support his contention the jury must agree on the particular offense a defendant is attempting to prevent a victim from reporting.

V

BIFURCATION OF GANG CHARGES

Before trial, Dugan asked the court to sever the substantive street terrorism counts (counts 4 & 8) from the other charges, and to bifurcate the street terrorism enhancement allegations as well. The request was denied. On appeal, Dugan contends the court erred by "refusing to bifurcate [the] gang charges from the substantive charges." Although he does not specifically challenge the denial of his motion to sever the substantive street terrorism counts, and the cases he discusses in his brief pertain to bifurcation of gang enhancements, out of an abundance of caution we address the trial court's ruling as to both.

We review the trial court's denial of Dugan's motion for abuse of discretion. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1048 (*Hernandez*) [bifurcation of enhancement]; *People v. Marshall* (1997) 15 Cal.4th 1, 27 (*Marshall*) [severance of charges].) Our review of the trial court's denial of the severance request is confined to the facts before the court at the time the motion was decided. (*People v. Price* (1991) 1 Cal.4th 324, 388.) The standard for reversing a trial court's order denying severance or bifurcation is high. "When the statutory requirements for joinder are met, a defendant must make a clear showing of prejudice to establish an abuse of discretion by the trial court. [Citations.] We review the trial court's decision 'in light of the showings then made and the facts then known.' [Citation.]" (*Marshall, supra,* 15 Cal.4th at p. 27.) "[A] party seeking severance must make a stronger showing of potential prejudice than would be necessary to exclude other-crimes evidence in a severed trial. [Citation.]" (*People v. Arias* (1996) 13 Cal.4th 92, 127.) Reversal of an order denying a motion to sever requires the defendant to show the joinder of the charges "resulted in 'gross unfairness,' amounting to a denial of due process. [Citation.]" (*Ibid.*)

Severance of Street Terrorism Substantive Counts

Section 954 provides that an information may charge "two or more different offenses connected together in their commission," but the trial court, in the interests of justice and upon a showing of good cause, may order the different offenses or counts be tried separately. "[A] defendant must make a clear showing of prejudice to establish that the trial court abused its discretion in denying the defendant's severance motion. [Citations.] In determining whether there was an abuse of discretion, we examine the record before the trial court at the time of its ruling. [Citation.] The factors to be considered are these: (1) the cross-admissibility of the evidence in separate trials; (2) whether some of the charges are likely to unusually inflame the jury against the defendant; (3) whether a weak case has been joined with a strong case or another weak case so that the total evidence may alter the outcome of some or all of the charges; and (4) whether one of the charges is a capital offense, or the joinder of the charges converts the matter into a capital case. [Citation.]" (*People v. Mendoza* (2000) 24 Cal.4th 130, 160-161 (*Mendoza*).) The fourth factor is not relevant here.

While gang evidence was arguably not cross-admissible as to the robbery counts (e.g., Dugan's gang activity was not necessary to prove the robberies—only the enhancements), the absence of cross-admissibility by itself does not demonstrate prejudice. (*Mendoza*, *supra*, 24 Cal.4th at p. 162.) Furthermore, the evidence likely would have been cross-admissible as to dissuading a witness (count 5), and making a criminal threat (count 6). During the Motel 6 incident, Dugan openly displayed what to Davis were obviously White supremacist (or skinhead) gang tattoos, threatened to kill Davis, or have people he knew kill her, and pulled a gun and put it to her head. Brown testified one of the purposes of wearing gang tattoos is to intimidate people, and Dugan's reference to people he "knew" could certainly be construed as a reference to other gang members. Thus, the gang evidence was relevant to whether Dugan had the specific intent

that his statements to Davis be taken as a threat and whether under the circumstances she reasonably feared for her safety. (§ 422.)

As to the second factor, Brown testified PENI gang members engage in crimes listed in section 186.22, including assault with a deadly weapon, murder, attempted murder, robbery, possession of drugs for sale, and extortion. He testified to three predicate offenses for which other PENI members suffered convictions including: possession of methamphetamine for sale; assault with a deadly weapon; and attempted murder. But we cannot say these charges were overly inflammatory—Brown's testimony regarding the predicate offenses was brief, and he testified only to the fact he had reviewed official records showing a PENI gang member pled guilty to the offense, and he did not describe any of the details of the predicate offenses.

And finally, as to the third factor, this is not a case where a weak case was joined with a strong case so as to alter the outcome. The robbery charges were not weak—Dugan's DNA was found on items left behind by the perpetrator, he was specifically identified by the security guard as the person leaving the store at the time of the robberies, and he boasted a few hours later that he had just committed a robbery. Similarly, the charges stemming from the Motel 6 incident were not weak—although Davis declined to identify the man in the room, it was Dugan for whom Caffey rented the room a few hours earlier, and Dugan who was there when police responded to the call about the disturbance. Therefore, we conclude it was not a prejudicial abuse of discretion for the trial court to deny Dugan's motion to sever the street terrorism counts from the other substantive charges.

Bifurcation of Street Terrorism Enhancement

In *Hernandez, supra*, 33 Cal.4th 1040, the court held the legal basis for bifurcation of a prior conviction allegation also permits bifurcation of a gang allegation. (*Id.* at p. 1049.) However, "the criminal street gang enhancement is attached to the charged offense and is, by definition, inextricably intertwined with that offense. So less

need for bifurcation generally exists with the gang enhancement than with a prior conviction allegation. [Citation.]" (*Id.* at p. 1048.)

Hernandez noted gang evidence may be relevant to "identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime. [Citation.]" (*Hernandez, supra*, 33 Cal.4th at p. 1049.) "To the extent the evidence supporting the gang enhancement would be admissible at a trial of guilt, any inference of prejudice would be dispelled, and bifurcation would not be necessary. [Citation.]" (*Id.* at pp. 1049-1050.) However, "[e]ven if some of the evidence offered to prove the gang enhancement would be inadmissible at a trial of the substantive crime itself—for example, if some of it might be excluded under Evidence Code section 352 as unduly prejudicial when no gang enhancement is charged—a court may still deny bifurcation." (*Id.* at p. 1050.)

Noting the benefits of unitary trials, *Hernandez* explained a "trial court's discretion to deny bifurcation of a charged gang enhancement is . . . broader than its discretion to admit gang evidence when the gang enhancement is not charged. [Citation.]" (*Hernandez, supra*, 33 Cal.4th at p. 1050.) Bifurcation is required only where a defendant can "'clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried.' [Citation.]" (*Id.* at p. 1051.)

Applying *Hernandez*, we find no abuse of discretion in the denial of Dugan's motion to bifurcate the gang enhancements. As noted above, at the very least the gang evidence was relevant on the substantive dissuasion and criminal threat offenses. Furthermore, the evidence concerning Dugan's participation in the PENI gang was relevant to prove street terrorism and as we have already explained, severance of the substantive counts was unnecessary in this case. *People v. Burnell* (2005) 132 Cal.App.4th 938, 948, is instructive. In that case, this court held trial counsel was not ineffective for having failed to request severance/bifurcation of substantive street terrorism counts and gang enhancements because it was unlikely such a motion would

have been granted. After explaining why severance of the substantive street terrorism counts was not necessary, the court observed, "If a severance of the street terrorism charge was highly unlikely, the bifurcation of the gang enhancements was even more unlikely. Virtually all f the gang evidence which would be admissible on the gang enhancements would also be admissible on the street terrorism charge. Thus, the jury would hear the evidence during trial of the substantive gang offense. Further, '[a]ny evidence admitted solely to prove the gang enhancement was not so minimally probative on the charged offense, and so inflammatory in comparison, that it threatened to sway the jury to convict regardless of defendants' actual guilt.' [Citation.]" (*Id.* at p. 948.)

In sum, because some gang evidence would have been admitted at a separate trial of the underlying offenses, any prejudice is dispelled. (*Hernandez, supra*, 33 Cal.4th at pp. 1049-1050.) Additionally, the trial court gave the jury the cautionary instruction regarding the permissible use of gang evidence, which we presume it followed. (*People v. Yeoman* (2003) 31 Cal.4th 93, 139.)

VI

SENTENCING ISSUES

A. Sentencing

Dugan was sentenced to a determinate term of 40 years, plus an indeterminate term of seven years to life. He raises three issues concerning his sentencing.

We begin with the facts concerning Dugan's sentencing. At the sentencing hearing, the trial court first discussed the counts arising from the PetSmart robbery (counts 1 through 4) and gave its reasons for concluding consecutive sentences on the three robbery counts (counts 1 through 3) were appropriate. The court pronounced the sentence on count 1 of 23 years comprised of a three-year middle term for robbery, a 10-year consecutive term for the firearm enhancement, and a 10-year consecutive term for the gang-benefit enhancement. The court next pronounced sentence on count 2 plus

related enhancements of seven years, eight months, and ordered it run "consecutive to any other sentence," followed by the sentence on count 3 plus related enhancements (seven years, eight months) and again ordered that term would run "consecutive to any other sentence." Lastly, the court imposed a two-year term on count 4 (substantive street terrorism), ordering it run "concurrent with any other sentence."

The court then moved on to the Motel 6 counts (counts 5 through 8). First, it imposed a total 16-year term on count 6 (criminal threat) and its related enhancements, but stayed the term pursuant to section 654 commenting "[s]o that 16 years will not be served by [Dugan]." The court next imposed a one-year, eight-month sentence on count 7 (felon in possession of a firearm) and its associated gang enhancement, "to be served consecutive to any other sentence." And finally, the court imposed a two-year term on count 8 (substantive street terrorism), to be served "concurrent to any other sentence."

Finally, the court pronounced sentence on count 5, dissuading a witness in violation of section 136.1. Because the jury found true the allegation count 5 was committed for the benefit of a criminal street gang, count 5 was punishable by an indeterminate term of seven years to life in prison. (§ 186.22, subd. (b)(4)(C).) Accordingly, the court pronounced that as to count 5 "the appropriate sentence is seven years to life. [¶] So [Dugan] has a total of [40] years . . . *plus* seven years to life."[3] (Italics added.)

The minute order from the sentencing hearing accurately reflects the length of the term imposed on each count. But as to each of the determinate terms, the minute order states the terms are to run consecutive (or concurrent as the case may be) to count 5 (the indeterminate term), and "[t]otal time to be served . . . is [40] years . . . *plus* [seven] years to life [w]ith the possibility of parole[.]" (Italics added.) The court ordered

[3] In initially announcing its sentence, the court stated the total term was 39 years, four months, but the court erred in its math. As Dugan concedes, 40 years is the correct figure. In a subsequent minute order, the court corrected is mathematical error and stated the term was "40 years, plus [seven] years to life."

"Abstract Clerk to issue two separate [a]bstracts. One for the life sentence and one for the state prison sentence[.]" The record on appeal contains only one abstract of judgment. We will discuss its contents (and infirmities) anon.

B. The Section 654 Issue: Count 7 Felon in Possession of a Firearm

Dugan contends the trial court erroneously imposed a consecutive sentence for count 7, possession of a firearm by an ex-felon. (§ 12021, subd. (a)(1).) He argues count 7 was part of a continuous course of conduct that resulted in his conviction on count 5, dissuading a witness, and count 6, criminal threat. The court stayed the count 6 sentence under section 654. Dugan asserts the court was required to stay the count 7 sentence under section 654 as well. We reject his contention.

Section 654 bars double punishment for multiple offenses that constitute one indivisible transaction. (*People v. Hicks* (1993) 6 Cal.4th 784, 788-789 (*Hicks*).) However, a defendant may be separately punished for offenses that share common acts and are part of an indivisible course of conduct where the defendant entertained multiple criminal objectives. (*People v. Cleveland* (2001) 87 Cal.App.4th 263, 267-268; *People v. Green* (1996) 50 Cal.App.4th 1076, 1084-1085 (*Green*).)

Whether a course of conduct is indivisible depends on a defendant's intent and objective, not temporal proximity of offenses. (*Hicks, supra,* 6 Cal.4th at p. 789; *People v. Jones* (2002) 103 Cal.App.4th 1139, 1143 (*Jones*).) Intent and objective are factual questions to be determined by the trial court. (*Green, supra,* 50 Cal.App.4th at p. 1085), and we will affirm its findings if supported by substantial evidence. (*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312.)

Whether a violation of section 12021 constitutes a transaction divisible from the offense in which the defendant uses the firearm depends on "the facts and evidence of each individual case." (*People v. Bradford* (1976) 17 Cal.3d 8, 22 (*Bradford*).) Multiple punishment is improper where the evidence shows "at most that fortuitous circumstances put the firearm in the defendant's hand only at the instant of

committing another offense[.]" (*People v. Ratcliff* (1990) 223 Cal.App.3d 1401, 1412.) But separate punishment for the firearm possession is proper "when the evidence shows that the defendant arrived at the scene of his or her primary crime already in possession of the firearm." (*Jones, supra,* 103 Cal.App.4th at p. 1145.)

Here, the evidence supports the conclusion Dugan already possessed the gun before his encounter with Davis at the Motel 6. Just hours earlier, he had committed the PetSmart robberies at gunpoint. When Dugan became upset with Davis, he pulled the gun from its hiding place behind a dresser in the room. There was no evidence suggesting merely "fortuitous circumstances" placed the firearm in Dugan's possession. Because the court could find Dugan possessed the handgun before he used it to threaten Davis, the court did not violate section 654 by imposing terms for dissuading a witness and the gun possession. (*Ratcliff, supra,* 223 Cal.App.3d at p. 1413.)

C. Count 5 Indeterminate Sentence is Consecutive

Dugan contends the trial court's oral pronouncement of judgment did not adequately impose the indeterminate term of seven years to life on count 5 as a consecutive sentence to the determinate term. Accordingly, he urges we must deem the indeterminate term to run concurrent to the determinate term and order preparation of a new abstract of judgment designating it as a concurrent term. We reject his contention.[4]

Under section 669 if a court fails to state whether sentences are to run concurrently or consecutively, by operation of law they are deemed to run concurrently. (*People v. Downey* (2000) 82 Cal.App.4th 899, 912-915; *People v. Caudillo* (1980) 101 Cal.App.3d 122, 125-127 (*Caudillo*).) Furthermore, when an indeterminate life term and determinate terms run consecutively, the determinate terms are to be served first. (*People v. Garza* (2003) 107 Cal.App.4th 1081, 1085.)

[4] Contrary to the Attorney General's contention, Dugan has not waived his challenge by failing to object below. (See *People v. Scott* (1994) 9 Cal.4th 331, 354 & fn. 17 [unauthorized sentences exempt from waiver rule]; *People v. Garza* (2003) 107 Cal.App.4th 1081, 1091.)

Dugan's argument is premised upon the trial court's failure to use the specific word "consecutive" when imposing the count 5 indeterminate term. But his reliance on *Caudillo, supra*, 101 Cal.App.3d 122, is misplaced. In that case, the trial court made no oral statement at the sentencing hearing as to whether defendant's sentences were to run concurrently or consecutively, and the minute order from the sentencing hearing was silent on the point. (*Id.* at p. 125.) The abstract of judgment prepared by the clerk indicated the sentences were consecutive, but the appellate court held section 669 contemplated the trial court must order whether terms are to run concurrent or consecutive, and the abstract of judgment did not constitute such an order. (*Ibid.*)

By contrast, in *People v. Edwards* (1981) 117 Cal.App.3d 436, the sentencing court did not expressly state that a robbery conviction was to run consecutive to any other count, but the abstract of judgment designated the terms as consecutive. The appellate court affirmed the sentence because in statements to counsel, the sentencing court indicated its intent to impose consecutive sentences. (*Id.* at p. 452.)

Here, in its oral pronouncement of judgment, when specifying the total sentence, the court stated its intent that Dugan would serve "a total of [40] years . . . *plus* seven years to life." (Italics added.) The minute order referred to consecutive terms and again stated Dugan's total sentence was "[40] years . . . *plus* [seven] years to life." The court's statements and minute order demonstrate the court plainly intended the indeterminate sentence in count 5 was to run consecutive to the other determinate terms.

D. The Multiple Errors in the Abstract of Judgment Require Remand

Dugan argues, and the Attorney General concedes, there are numerous errors in the abstract of judgment requiring attention. We agree. We further observe the minute order from the sentencing hearing also does not completely comport with the trial court's oral pronouncement of judgment and must be corrected as well. (*People v. Farell* (2002) 28 Cal.4th 381, 384, fn. 2 [oral pronouncement of court controls over clerk's

minute order].) Because these are clerical errors and do not affect the judgment, we have authority to order the trial court to make the necessary corrections. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.)

In its oral pronouncement of judgment, the trial court imposed the determinate terms first, then the indeterminate term, then summarized that Dugan was to serve "a total of [40] years . . . *plus* seven years to life." The trial court's manner of articulating the sentence correctly tracked the legal requirement that when imposed as consecutive terms, determinate terms are to run *first*, followed by the indeterminate term. (§ 669.) The minute order, however, designates count 5 (the indeterminate term) as the principal term by stating that each determinate term is to run consecutive to count 5. If the determinate terms were to follow the indeterminate term, that sentence would be illegal. (*People v. Grimble* (1981) 116 Cal.App.3d 678, 684-685 [sentence purporting to require determinate sentence to follow life term was illegal and subject to correction]; see *People v. Reyes* (1989) 212 Cal.App.3d 852, 856 [when defendant is sentenced to determinate and indeterminate terms, determinate term must be served first; neither term is "'principal'" or "'subordinate,'" and each must be considered and calculated independently of the other].) Accordingly, the trial court is directed to issue a nunc pro tunc minute order accurately reflecting its oral pronouncement of judgment specifying the indeterminate term on count 5 is consecutive to the determinate terms on the other counts.

We turn to the abstract of judgment. Despite two separate minute orders directing that two abstracts of judgment be prepared—one for the determinate term and one for the indeterminate term—only one abstract was prepared using the indeterminate term form and that abstract is replete with errors including: (1) in section 1, the abstract illegally designates the determinate terms as running consecutive to the indeterminate term (count 5), fails to specify the actual terms imposed for counts 1, 2, 3, 4, and 6, and does not include an attachment specifying any terms for counts 7 or 8; (2) in section 2,

the abstract fails to indicate if enhancements related to count 5 were stayed or imposed (although, we note that in section 11 there are references to a gang enhancement and firearm enhancement as being stayed, it is not clear if that refers to the count 5 enhancements); (3) in section 5, the abstract erroneously states Dugan received sentences of straight "life with possibility of parole" on counts 1 through 5, when he received no such sentences on any counts; and (4) in section 6, the abstract fails to state the number of years associated with the indeterminate sentence on count 5 (i.e., seven years to life), and erroneously states he was also sentenced to "___ years to life" on counts 1, 2, 3, 4, 5, 7, and 8. Accordingly, the abstract of judgment must be corrected to specify the determinate terms are to run first, to be followed by the indeterminate term.

VII

DISPOSITION

The judgment is affirmed. The case is remanded for the following purposes: (1) the trial court shall issue a nunc pro tunc minute order accurately reflecting its oral pronouncement of judgment specifying the indeterminate term on count 5 is consecutive to the determinate terms on the other counts; (2) the trial court shall prepare two new abstracts of judgment, one for the determinate term and one for the indeterminate term, accurately recording its sentence and forward copies of the same to the Department of Corrections and Rehabilitation, Division of Adult Operations.

O'LEARY, ACTING P. J.

WE CONCUR:

MOORE, J.

IKOLA, J.